No. 89-1418

In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA, PETITIONER

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE OF THE UNITED STATES POSTAL SERVICE TO THE MOTION TO DISMISS

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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The respondent unions have moved to dismiss the petition in this case for lack of jurisdiction on two grounds. First, they argue that there is no case or controversy over the validity of the international remailing regulation because the Postal Service did not seek review in this Court of the judgment below holding the regulation invalid. Mot. to Dis. 10. Second, the unions contend that petitioner Air Courier Conference lacks standing to seek review in this Court of the judgment below since petitioner has not shown that it faces a clear threat of prosecution under the Private Express Statutes (PES), 18 U.S.C. 1693-1699 and 39 U.S.C. 601-606, if the regulation

is held invalid. Mot. to Dis. 11. Both claims lack merit.

1. The unions concede that an Article III case or controversy would be present if the Postal Service had sought review in this Court of the judgment below, Mot. to Dis. 10, but they argue that no case or controversy now exists because the Postal Service did not file its own certiorari petition. *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297 (1983), however, demonstrates that the unions' claim is without merit.

The question in *Perini* was whether a private party, Raymond Churchill, was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901. After the court of appeals held that Churchill was not, the federal government filed a certiorari petition, but Churchill did not. His employer argued that there was no case or controversy since the federal government did not have a financial interest in the outcome of the dispute and was, instead, interested only in the correct rule of law. This Court rejected that claim. 459 U.S. at 302-305. The Court reasoned that the Director, as a "party" in the court of appeals, was entitled under 28 U.S.C. 1254(1) to petition for a writ of certiorari; that Churchill, as an automatic respondent under Sup. Ct. R. 19.6 (1980) (current version at Sup. Ct. R. 12.4), was entitled to seek reversal of the court of appeals' judgment; and that Churchill had a sufficient interest in the outcome of the dispute to give him standing to urge this Court to resolve it.

This case is not materially different from *Perini*. The Air Courier Conference was a party in the district court and in the court of appeals and therefore under 28 U.S.C. 1254(1) can petition this Court to

review the court of appeals' judgment. The Air Courier Conference is a petitioner, seeking to have the judgment below reversed. The Postal Service, pursuant to Rule 12.4 of this Court's Rules, is a respondent supporting the petitioner. The unions are respondents defending the judgment below. Accordingly, here as in *Perini* the parties are aligned in a manner that shows there is an actual controversy between them. Moreover, the Air Courier Conference and the Postal Service each has a legally cognizable interest in having the judgment below reversed and the Service's regulation upheld. The Postal Service has an interest in having its regulation upheld as a lawful exercise of its delegated powers, and the Air Courier Conference, as champion of its members' interests, has an interest in seeing lifted the restrictions otherwise imposed by the PES on international remailing, so that those members will be free of the risk of criminal prosecution or civil suit. Under these circumstances, there clearly is a justiciable controversy before the Court.

Relying on *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972)), the unions claim, however, that since the Postal Service "alone is entitled to create" an international remailing regulation, only the Postal Service has a "direct stake" in defending that regulation. The *Diamond* case, however, is inapposite.

In *Diamond*, the court of appeals held unconstitutional a state law making it a crime to perform abortions in certain circumstances. The State did not appeal that judgment to this Court, but a private party physician, who had intervened in the district court, took such an appeal. This Court ruled that the physician lacked standing to perfect an appeal. The

Court reasoned that just as "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," 476 U.S. at 64 (quoting *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)); see 476 U.S. at 64-65 (collecting cases), so, too, a private citizen cannot step into the government's shoes in an attempt to defend over the government's objection the constitutionality of one of its criminal laws. *Id.* at 65.

By contrast, here a private party is not seeking to defend the validity of a law making it a criminal offense to engage in otherwise lawful conduct. On the contrary, the Air Courier Conference is seeking to uphold a regulation lifting the criminal sanctions otherwise applicable to the conduct of its members by creating an exception to the scope of a criminal law. For that reason, this case is the precise *opposite* of *Diamond*. A private party surely has a legally cognizable interest in the validity of a regulation immunizing that very party from criminal prosecution or civil liability. Because that is the interest the Air Courier Conference seeks to protect, it may do so even though the Postal Service (for the reasons set forth in its Opposition) did not file its own certiorari petition from the judgment below.

2. If we are right that this case is controlled by *Perini*, then there is no need to consider the unions' second challenge to the standing of the Air Courier Conference, since the controversy before this Court is justiciable for the reasons given in Point 1 regardless of how the Court resolves the unions' argument. In any event, that claim lacks merit.

The unions second claim is that the Air Courier Conference lacks standing because the Conference has not proved that its members will be prosecuted

if the judgment below is permitted to stand. Mot. to Dis. 11. Relying on statements in the administrative record by Department of Justice officials that members of the Air Courier Conference will not be criminally prosecuted for engaging in international remailing, the unions contend that the Air Courier Conference has not shown that the judgment below injures its members by exposing them to the threat of a criminal prosecution, since no such prosecutions will be brought. *Ibid.* That argument is flawed.

The judgment below held invalid the international remailing regulation and thus adversely affected the Air Courier Conference, since the regulation permitted its members to engage in international remailing free of the risk of a criminal prosecution. That regulation also provided those parties with greater protection than the statements cited by the unions. A statement by a law enforcement official that a certain type of prosecution will not be brought can be altered or revoked at the will of the official who uttered it (or any superior). By contrast, a regulation can be modified or revoked only by following the rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553. See *Motor Vehicle Mfgs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). For that reason, if the international remailing regulation is upheld, private parties can follow that practice without risk of criminal liability, since the government must comply with its own regulations. See *United States* v. *Caceres*, 440 U.S. 741, 753-754 (1979).[1] Thus, by holding

[1] *Caceres* stated that an agency's failure to follow its own regulations can be challenged under the APA. 440 U.S. at 754. That is not true in this case, since the Postal Service is exempt

that regulation invalid, the judgment below had a real and immediate effect on the members of the Air Courier Conference.

This is simply a matter of common sense. There is a palpable difference between engaging in apparently criminal conduct in reliance on assurances from prosecutors that one will not be prosecuted, and engaging in the same conduct in light of a formal regulation specifying that such conduct is exempt from the criminal prohibition. That difference is plainly sufficient to support Article III standing.

The regulation also immunizes private parties from a civil action if they engage in international remailing. For example, the Tenth Circuit has held that postal employee unions can bring suit against parties that engage in practices violating the PES. *National Ass'n of Letter Carriers* v. *Independent Postal System of America, Inc.*, 470 F.2d 265 (1972). Contra *American Postal Workers Union* v. *Independent Postal System of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), cert. dismissed, 415 U.S. 901 (1974). Significantly, the unions do not suggest that they will not sue members of the Air Courier Conference for engaging in international remailing if the judgment below is left undisturbed, and the

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from the APA, as we argued in our opening brief (at 9-12). Nonetheless, the Postal Service has adopted a regulation providing that the Service will follow the APA rulemaking provisions in amending its regulations. 39 C.F.R. 310.7. Although that regulation cannot be enforced under the APA, since the APA does not apply to the Postal Service, 39 U.S.C. 410(a), it can be enforced in an action brought under the mandamus statute, 28 U.S.C. 1361. Thus, the proposition stated in the text applies to the Postal Service as to other branches of the federal government.

very fact that the unions brought this action is a strong basis for believing that they would sue. Cf. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 342 (1986).[2]

It is therefore respectfully submitted that the motion to dismiss the petition for lack of jurisdiction should be denied.

JOHN G. ROBERTS, JR.*
Acting Solicitor General

AUGUST 1990

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[2] The unions err in relying, Mot. to Dis. 11, on *Whitmore* v. *Arkansas*, 110 S. Ct. 1717 (1990). *Whitmore* held that a condemned state prisoner lacked standing to challenge in federal court the legality of the sentence imposed on another condemned prisoner. This Court found speculative Whitmore's claimed personal injury, which rested on the possibility that his already-final conviction or sentence would be set aside; that he would be retried for and reconvicted of a capital crime; that he would be resentenced to death; and that his death sentence would be set aside if it were compared against the sentence of the other prisoner whose cause Whitmore sought to champion. 110 S. Ct. at 1723-1725. That case is not remotely similar to this one. If the judgment below is reversed and the Postal Service's regulation upheld, the Conference will immediately enjoy the protection from criminal or civil liability that the regulation provides.

* The Solicitor General is disqualified in this case.

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